

Office of the Secretary, HUD

§ 26.50

specifying the time and location of the hearing, the matters of fact and law to be heard, the legal authority under which the hearing is to be held, a description of the procedures for the conduct of the hearing, and such other matters as the ALJ determines to be appropriate.

(d) *Exceptions for Program Fraud Civil Remedies Act matters.* For Program Fraud Civil Remedies actions, the hearing is commenced by the issuance of a notice of hearing and order by the ALJ, as set forth in 31 U.S.C. 3803(d)(2)(B). Hearings for Program Fraud Civil Remedies Act matters shall be located in accordance with 31 U.S.C. 3803(g)(4).

(e) *Burden and standard of proof.* HUD shall prove the respondent's liability and any aggravating factors by a preponderance of the evidence. Respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(f) *Public hearings.* Unless otherwise ordered by the ALJ for good cause shown, the hearing shall be open to the public.

§ 26.46 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. In order to be admissible, any written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

§ 26.47 Evidence.

The ALJ shall admit any relevant oral or documentary evidence that is not privileged. Unless otherwise provided for in this part, the Federal Rules of Evidence shall provide guidance to the ALJ's evidentiary ruling, but shall not be binding. Parties may object to clearly irrelevant material, but technical and hearsay objections to testimony as used in a court of law will not be sustained. The ALJ may, however, exclude evidence if its probative

value is substantially outweighed by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

§ 26.48 Posthearing briefs.

Posthearing briefs shall be filed only upon order by the ALJ.

§ 26.49 The record.

The hearing will be recorded and transcribed by a reporter designated by the Department under the supervision of the ALJ. The parties and the public, at their own expense, may obtain copies of transcripts from the reporter. A copy of the transcript shall be made available at cost to the parties upon request. The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary or designee.

§ 26.50 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the relief granted. The ALJ's initial decision shall not become effective unless it becomes or is incorporated into final agency action in accordance with § 26.50(c) or § 26.52(1).

(b) The ALJ shall serve the initial decision on all parties within 60 days after either the close of the record or the expiration of time permitted for submission of posthearing briefs, whichever is later. The ALJ may extend the 60-day period for serving the initial decision in writing for good cause. The initial decision shall inform the parties that, if provided for and consistent with Departmental regulations, any party may request, in writing, Secretarial review of the determination within 30 days after the ALJ issues the initial decision, in accordance with § 26.52 of this part. The determination shall include the mailing address, facsimile number, and electronic submission information to which the request for Secretarial review should be sent. A request for Secretarial review may be made by mail, delivery, facsimile, or electronic submission.

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(c) If no appeal is timely filed with the Secretary or designee, the initial decision shall become the final agency action.

§ 26.51 Interlocutory rulings.

(a) *Interlocutory rulings by the ALJ.* A party seeking review of an interlocutory ruling shall file a motion with the ALJ within 10 days of the ruling requesting certification of the ruling for review by the Secretary. Certification may be granted if the ALJ believes that:

(1) It involves an important issue of law or policy as to which there is substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(b) *Petition for review.* Any party may file a petition for review of an interlocutory ruling within 10 days of the ALJ's determination regarding certification.

(c) *Secretarial review.* The Secretary, or designee, shall review a certified ruling. The Secretary, or designee, has the discretion to grant or deny a petition for review from an uncertified ruling.

(d) *Continuation of hearing.* Unless otherwise ordered by the ALJ or the Secretary, or designee, the hearing shall proceed pending the determination of any interlocutory appeal, and the order or ruling of the ALJ shall be effective pending review.

§ 26.52 Appeal to the Secretary.

(a) *General.* Either party may file with the Secretary an appeal within 30 days after the date that the ALJ issues an initial decision. The Secretary or the Secretary's designee may extend the 30-day period in his or her sole discretion, for good cause.

(b) *Brief in support of appeal.* The appeal shall be accompanied by a written brief, not to exceed 15 pages, specifically identifying the party's objections to the initial decision or order of the ALJ and the party's supporting reasons for any objections. The appealing party may request leave to file a brief in excess of 15 pages for good cause shown. Alternative proposed findings and con-

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clusions, if any, may be appended as an exhibit.

(c) *Briefs in opposition.* Any opposing party may submit a brief in opposition to the appeal, not to exceed 15 pages, within 20 days of the date a copy of the appeal and accompanying brief were received. The opposing party may request leave to file a brief in excess of 15 pages for good cause shown. The brief in opposition shall specifically state the opposing party's reasons for supporting the ALJ's determination or taking exceptions to any part of the ALJ's determination.

(d) *Extensions and additional briefs.* The Secretary or Secretary's designee may extend the deadlines or page limitations set forth in paragraphs (b), (c), and (d) of this section, in his or her sole discretion. The Secretary may also permit the filing of additional briefs, in his or her sole discretion.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the ALJ shall forward the record of the proceeding to the Secretary or designee.

(f) *Personal appearance.* There is no right to appear personally before the Secretary or designee.

(g) *ALJ decisions upon failure to prosecute or defend.* There is no right to appeal any decision issued by an ALJ in accordance with § 26.37(d) of this part.

(h) *Objections not raised before ALJ.* In reviewing the initial decision, the Secretary or designee shall not consider any objection that was not raised before the ALJ, unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) *Evidence considered.* The Secretary or designee shall consider only evidence contained in the record forwarded by the ALJ. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the ALJ for reconsideration in light of the additional evidence.

(j) *Ex parte communications.* The prohibitions of ex parte communications